In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-320

BRANIFF AIRWAYS, INC., PETITIONER

v.

EL PASO COIN COMPANY, INC. AND
CONTINENTAL AIRLINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States submits this memorandum as *amicus curiae* in response to this Court's invitation of October 20, 1975.

1. On December 18, 1972, El Paso Coin Company tendered three cans containing gold coins to Continental Airlines at El Paso, Texas, for shipment to La Guardia Airport, New York. An airbill placed on each can of coins in a clear plastic envelope described the shipment as "one can coin" and declared the value of the shipment to be $26,625.00 (Pet. App. A-1, A-2). Continental delivered the coins to Braniff Airways at Dallas, Texas, and Braniff agreed to deliver the coins to La Guardia Airport (*id.* at A-2, A-3). Because no additional flights to La Guardia were scheduled for that day, Braniff altered the destination to Kennedy

Airport. Braniff's flight manager at Kennedy received two of the cans and properly delivered them. The third can of coins could not be found by Braniff (*id.* at A-4).

The District Court of El Paso County held that Braniff was negligent both in changing the routing of the shipment from La Guardia Airport to Kennedy Airport and in failing to deliver the shipment to the consignee (*id.* at A-5). Rejecting the carriers' argument that their air carrier tariffs, which had been filed pursuant to federal law, required advance arrangements on shipments of extraordinary value as a condition precedent to holding the carriers liable, the court held that both carriers waived the tariffs in two ways: (1) by accepting the cans of coins with the airbills in plain view, and (2) by a prior course of conduct, pursuant to which Continental had on various occasions shipped cans of coins for the El Paso Coin Company to New York, through Dallas and by Braniff, without advance arrangements (*ibid.*). The court entered judgment in the amount of $26,625 jointly and severally against Continental and Braniff. Continental paid the judgment and was awarded a judgment against Braniff, which appealed.

The Court of Civil Appeals affirmed, recognizing that federal law controls but concluding that "there is no Federal regulation setting out the rights and liabilities between shipper and carrier and connecting carriers nor is it spelled out in the tariffs" (Pet. App. B-2). Accordingly, the court turned to the Texas Uniform Commercial Code. The court held that under the Uniform Commercial Code Braniff was liable for the loss of the coins. The court conceded that a contrary provision in the tariff might have been dispositive, but it held that the tariff as actually written did not support Braniff's position (*id.* at B-4). Finally, addressing Braniff's argument that provisions in the tariff may not be waived, the court concluded that the

question was academic because Braniff had not established that the sole proximate cause of the loss was the failure of either El Paso Coin or Continental to make advance arrangements for shipment of the coins (*id.* at B-5).

2. Petitioner contends that disputes concerning the rights and liabilities of shippers and carriers in interstate air freight transactions must be resolved by applying federal law and that, under federal law (which, it contends, is embodied in its tariff), it cannot be held liable. Although the United States supports petitioner's argument that tariffs supersede inconsistent provisions of state or local law,[1] this case does not require decision upon that argument. The Texas Court of Civil Appeals acknowledged that the tariffs would prevail to the extent they were inconsistent with state law, and held only that there was no inconsistency.

Braniff relies upon Tariff Rule 23(B). That rule provides (Pet. App. D-2) that articles of extraordinary value "will be accepted for transportation provided that * * * advance arrangements are made for the shipment." The rule has two effects: (1) it entitles an air carrier to refuse to accept the shipment if no advance notice is given, and (2) it requires the carrier to accept the shipment if the advance notice is given. In order for Braniff to prevail, the rule would be required to have still a third effect: it would have to *forbid* the air carrier to accept the shipment in the absence of advance notice. But the language of the rule will not bear such a construction. Nor is such a construction suppported by what we understand to be the purpose of the rule—to give the air carrier time to take precautions against loss when it believes such precautions justified. Since the rule does not forbid a carrier to accept a shipment without advance notice, Continental's and Braniff's employees did not violate the tariff by their actions.

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[1]See, *e.g.*, *Blair* v. *Delta Air Lines, Inc.*, 344 F. Supp. 360 (S.D. Fla.), affirmed *per curiam*, 477 F.2d 564 (C.A. 5).

Moreover, Braniff did not establish that a violation of Rule 23(B) would relieve it from liability to the shipper. Tariff Rule 30(B) (1) (b) provides (Pet. App. D-2) that a carrier is not liable for loss "if it proves that it and its agents have taken all necessary measures to avoid the damage or that it was impossible for the carrier or its agents to take such measures." And Rule 30(B) (1) (c) provides (Pet. App. D-3) that "[t]he carrier shall not be liable for damage caused by the act or default of the consignor or the consignee." These rules—not Tariff Rule 23 (B)—establish the limits upon Braniff's liability, and the Texas courts were entitled to conclude that Braniff had not taken the necessary precautions or shown that the loss was caused by either the consignor or the consignee.

Accordingly, the result reached by the lower courts is consistent with Braniff's liability under its tariffs. The question stated in the petition is not properly presented on the facts of this case. Although the Texas courts should have looked initially to Tariff Rule 30 rather than to the Uniform Commercial Code, Braniff has not been prejudiced by any error the courts may have committed.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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[2]Resolution of the question whether tariffs preempt state law would also be premature, because the Civil Aeronautics Board is now conducting a full scale investigation of the air carriers' tariff rules relating to liability and claims. *Liability and Claim Rules and Practices Investigation*, Docket 19923.

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Petitioner,

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EL PASO COIN COMPANY, INC., and
CONTINENTAL AIRLINES, INC.,

Respondents.

Brief of Respondent, Continental Airlines, Inc.,

Respondent, Continental Airlines, Inc., urges that writ of certiorari be denied.

JURISDICTION

This case is controlled by the findings of fact that were made by the state courts, which findings determine whether in fact Petitioner waived the limiting language of the tariff at the time Petitioner received and accepted the shipment, and whether in fact Petitioner, in the face of the terminal carrier presumption, proved an excuse for the loss in question. It is necessary to consider the factual matters in order

to pass upon the question of whether Petitioner has been denied a Federal "right" which Petitioner claims the tariff gives to Petitioner. Only "exceptional circumstances" would justify rejecting the findings of fact in the state courts. *Evco v. Jones*, 409 U.S. 91 (1972); *Fry Roofing v. Wood*, 344 U.S. 157 (1952). "The ordinary rule applies that the decision of the state court upon a question of fact cannot be made the subject of inquiry here". *Grayson v. Harris*, 267 U.S. 352, 358.

The Texas courts did not refuse to apply the air freight tariff, as Petitioner asserts. The District Court found (Petition Appendix A-7) that the tariff was in force as to the shipment, requiring advance arrangement for shipments of extraordinary value. The Court of Civil Appeals found (Petition Appendix B-2) that proof of a tariff violation as the cause of loss could be a defense. The state courts recognized that Federal law controls, but this case did not come out of a vacuum; instead, it came out of a particular set of facts. The District Court found (Petition Appendix A-4, A-5) that Petitioner's agent knew the shipment was high value, could have rejected it, but accepted it, and that Petitioner was negligent in handling the shipment. The Court of Civil Appeals found (Petition Appendix B-4) that Petitioner did not refute the facts establishing liability, or prove a defense.

This case is controlled by the facts, and is not a proper case for exercise of jurisdiction.

QUESTION PRESENTED

Does an air carrier, which knowingly accepts a high value shipment, where prearrangement has not been made by the shipper or originating carrier, waive the tariff requirement of prearrangement, does the terminal carrier presumption apply, and must the terminal carrier prove an excuse for the loss.

STATEMENT

Statement by Petitioner omits the following:

Petitioner's agent, Robinson, received the shipment in Dallas and signed the transfer manifest. The air bills were in clear plastic envelopes, one attached to each can of coins, and the air bill in question said "one can coins", "$26,625.00". Robinson's superiors testified that Robinson's duty was to inspect the cargo, that Robinson could have refused the shipment or called a supervisor to see if the shipment should be refused, but that the shipment was accepted and physically handled by Robinson and other agents. All agents knew that no prearrangement had been made, because in fact none had been made. Petitioner called three agents to testify, though none had personal knowledge of Robinson's acts, but Petitioner did not call Robinson, still an employee at time of trial.

Robinson could have sent the valuable shipment in for security handling, but he did not, nor did others who handled it. Petitioner's witnesses said that later it was determined that the three cans were recalled as being in an igloo on a freight flight to Kennedy New York, but there was no record of this, since the manifest on the igloo in question showed only a total weight. Two of the cans were accounted for at Kennedy, but not the third. It is not known whether the loss took place in Dallas or at Kennedy.

The air bill called for shipment to LaGuardia.

REASONS FOR DENYING THE PETITION

The petition for writ of certiorari should be denied because the judgment and appellate opinion of the state courts are correct; the judgment arises from a particular fact situation and the case has minimal effect as precedent; and Petitioner's position in asking certiorari is not consistent with the position taken in state courts, where Petitioner now says there can be no waiver of the tariff provision for prearrangement, but in state court said there could be waiver if the facts showed Robinson's knowledge of the value when he accepted the shipment.

I

THE JUDGMENT AND APPELLATE OPINION OF THE STATE COURTS ARE CORRECT. FEDERAL LAW WAS CORRECTLY APPLIED.

The case having been tried without a jury, it was for the Trial Judge to determine the credibility of the witnesses and the weight to be given their testimony. 4 *Texas Jurisprudence* (2) 398, Appeal and Error — Civil, section 839. There was ample evidence that Petitioner's agent, Robinson, saw the air bill when he signed for the shipment and handled the cans, and thus he knew the information on the air bill. He knew that the cargo was one can of coins, value of $26,625.00. Moreover, he knew that paint cans were the usual means of shipping coins by air freight, and he knew that there was a great deal of traffic in the coin business, since this was widely known by the airlines. Moreover, the Trial Judge could weigh the evidence regarding Robinson's knowledge of the value of a coin shipment in the light of the fact that Petitioner did not call its employee Robinson to the witness stand. Robinson was still in Petitioner's employ at the time of trial, and Petitioner brought three employees to the trial, but not the one witness who could clearly say the nature of inspection of the cargo made by Robinson and the extent of Robinson's knowledge at the time he received the shipment and signed for it "in good order". Where a party fails to call a witness who has knowledge of facts and whose testimony is available, such failure creates a presumption that the testimony, if produced, would be *un*favorable to the party on the issue involved. McCormick & Ray, *Texas Evidence*, vol. 1, page 138, section 101 (2nd edition, 1956). The economic interests of an employee such as Robinson make him peculiarly available to the employer. 29 *American Jurisprudence* (2) 224, Evidence, section 180, 181.

So, beyond question the Trial Judge was correct in finding that Robinson inspected the can, signed the manifest, moved the can onto Petitioner's truck and saw the air bill in the envelope. At that time, Robinson knowingly re-

ceived a high value shipment, knowing that no prearrangement had been made for the shipment and knowing that he was not receiving or handling it under procedures for high value shipments. Thus, the facts for waiver took place.

The tariff provision for prearrangement of valuable shipments could be waived by Petitioner. 13 *Corpus Juris Secundum* 226, Carriers, section 114. The waiver here took place at the time Petitioner undertook the shipment. Such circumstances are distinguishable from cases where a waiver is asserted by reason of things done by the carrier *after* the shipment is in progress, as in *Chesapeake Ry. v. Martin*, 283 U.S. 209 (1931) or *Lichten v. Eastern Airlines*, 189 F. (2d) 939 (Second Circuit, 1951). An air carrier's tariff can be waived, *Orlone v. Phillipine Air Lines*, 257 F.(2) 384 (Second Circuit, 1958), cert. den., 358 U.S. 909; further, the doctrine of primary and secondary liability apparently still has application in indemnity matters such as this. Such would be significant where Respondent's negligence was in accepting the shipment of coins, and the Petitioner's negligence was in (1) accepting the forwarding of the shipment, (2) handling the can several times without applying security, (3) changing the routing and (4) losing the shipment.

If an airline literally could never be said to have waived a tariff, then it could impose on its customers. Suppose a carrier accepted the cans at its counter and wrote air bills on high value (as Respondent did in this case), then later said it had not waived the tariff requirement of prearrangement. That would be unconscionable. It is obvious that the value was known when the shipment was accepted. Yet, the finding of fact is that Petitioner's agent knew the value when Petitioner accepted the shipment, though it took more effort to prove that agent's knowledge, where he was absent and Petitioner's other witnesses had no personal knowledge of the receipt of the shipment in Dallas. The District Court found the facts of waiver. The Court of Civil Appeals affirmed the judgment. Both courts applied Federal law.

The Court of Civil Appeals called the subject of waiver "academic", because it held, by authority citing *Chicago & Northwestern Ry. v. Whitnack*, 258 U.S. 369 (1922), that the presumption applies that the terminal carrier caused the loss. The Court said the tariff does not speak to this subject — "the rights and liabilities between shipper or carrier and connecting carrier" — but that the presumption does, and so does the Uniform Commercial Code. The Court is correct in this, and even if it is said to be wrong in calling waiver "academic" then the judgment of the District Court is correct on the basis of waiver.

The Court of Civil Appeals placed the burden of proof according to *Missouri Pacific v. Elmore*, 377 U.S. 134 (1964) and held as a matter of fact that Petitioner did not meet the burden. The facts, the presumptions and the law were against Petitioner.

The state court did not ignore or refuse to apply Federal law, and the state court rulings are correct.

II

THE CASE HAS MINIMAL EFFECT AS PRECEDENT.

This case came out of a particular fact situation, fully stated in the Court of Civil Appeals opinion, and is precedent only in another case where a carrier accepts a shipment knowing that the tariff provision of prearrangement for the shipment has not been met. It is not new authority on the subject of waiver, presumptions or burden of proof.

Petitioner says this case, along with *Travelers Insurance Co. v. Delta Air Lines*, 498 S.W. (2d) 443 (Tex. Civ. App., 1973, no writ history), and *Farah Mfg. v. Continental Airlines*, 524 S.W. (2d) 815 (Tex. Civ. App., 1975, application for writ filed), show a "direction being taken by Texas Courts", needing review. In *Farah* the parties presented a law question when each filed a motion for summary judgment, and the state courts had to decide whether time allowed in the tariff for filing claim is extended when the carrier knows of the loss, does not advise the shipper, and

the shipper has not discovered the loss. Federal authority is cited and distinguished, and *Farah* does not appear to be curious precedent. In *Travelers* the insurance company apparently did not consider the case a bad trend, though Petitioner says it does, for an application was not filed to ask review by the Supreme Court of Texas. The airline agents in *Travelers* said they would have initiated a security handling of the shipment if it had been known the shipment contained jewelry. In our case, the airline agents knew the shipment was a valuable item, but did not initiate security handling.

III

PETITIONER NOW SAYS THERE COULD BE NO WAIVER. IN THE STATE COURTS, PETITIONER GRANTED THAT WAIVER DEPENDED ON THE FACTS.

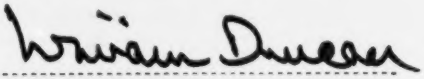
In its petition, Petitioner now says the District Court's finding of waiver "was in direct contravention of Rule 26(F) of the tariff" (page 3), and complains that the Court of Civil Appeals "sidestepped" the subject (page 4).

However, in its Application for Writ of Error in the Supreme Court of Texas, Petitioner briefed the point (Appendix A-1 hereto), saying "Petitioner contends the tariff requirements cannot be waived, as a matter of law, and further contends there is no evidence supporting the trial court's findings of waiver factually. First, the tariffs themselves state there can be no waiver * * * Secondly, there is no evidence supporting the trial court's findings of fact on waiver * * *". This was recognized as the point of the case. The requirement for prearrangement could be waived by Petitioner, by knowingly accepting the valuable shipment, and there was waiver here. This continues to be the point of the case, and the Court of Civil Appeals is correct in the further finding that the terminal carrier presumption placed a burden of proof on Petitioner which Petitioner failed factually to discharge.

CONCLUSION

Petition for Writ of Certiorari should be denied.

Respectfully submitted,



WILLIAM DUNCAN,

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CERTIFICATE OF SERVICE

The undersigned attorney of record for Respondent, Continental Airlines, Inc., hereby certifies as follows:

(a) that I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Brief, as hereinafter shown;

(b) that the names and addresses of the attorneys of record for each of the adverse parties are as follows:

Harold L. Sims, P. O. Drawer 1977, El Paso, Texas 79950; attorney for Braniff Airways, Inc., Petitioner;

Norman N. Rosen, 809 El Paso National Bank Building, El Paso, Texas 79901; original attorney for El Paso Coin Company;

(c) that on this day I served three printed copies of the foregoing Brief on Harold L. Sims and Norman N. Rosen, by depositing same in the United States post office in El Paso, Texas, with first class postage prepaid, properly addressed to said attorneys at their said addresses.

EXECUTED this 22 day of September, 1975.

William Duncan

Attorney for Respondent,
Continental Airlines, Inc.

EXCERPT FROM PETITIONER'S BRIEF IN SUPREME COURT OF TEXAS

POINT II (RESTATED)

THE COURT OF CIVIL APPEALS ERRED IN OVERRULING PETITIONER'S POINT OF ERROR THAT THE TRIAL COURT ERRED IN FINDING PETITIONER WAIVED THE REQUIREMENTS OF THE APPLICABLE TARIFFS.

BRIEF OF POINT II

Liability in the trial court was adjudged against Petitioner *solely* on the basis of waiver and resulting negligence in re-routing the shipment from La Guardia Airport to John F. Kennedy Airport and, after such re-routing, failing to deliver (Conclusions of Law 1-4). Petitioner contends the tariff requirements cannot be waived, as a matter of law, and further contends there is no evidence supporting the trial court's findings of waiver factually.

First, the tariffs themselves state there can be no waiver. Rule 26f, applicable on December 18, 1972, read as follows:

> "* * * No agent, servant or representative of carrier has authority to alter, modify or *waive* any provision of the contract of carriage or of this tariff." (Emphasis supplied). (S.O.F. Def. Ex. 2).

In addition, it has been judicially determined that a carrier cannot be estopped from invoking tariff requirements nor can a carrier waive the requirements. *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209 (1931); *Schneinman v. Eastern* Airlines, 318 NYS 2d 992 (1971); and *Lichten v. Eastern Airlines, supra.*

Secondly, there is no evidence supporting the trial court's findings of fact on waiver. Findings of Fact 12 and 14 state that Robinson "did inspect"; there was no direct evidence as to what Robinson actually did, although it is clear under the applicable tariffs Robinson had no duty of inspection whatsoever. (Tariff Rule 24, S.O.F. Def. Ex. 2). In Findings

of Fact 15 and 18, the trial court found Robinson "saw the airbill" and that he "knew" no pre-arrangements had been made; as previously stated, there is no evidence of what Robinson saw or did in the trial record and it has been previously established it was not necessary for Robinson to ever look at the airbill to do his job. In Finding of Fact 17, the trial court found that prior to December 18, 1972, Continental had made similar shipments to New York using Braniff as a connecting carrier without pre-arrangements; this is not supported in the evidence as the director of cargo service of Continental, Herman Blann, testified that he could not specifically recall prior shipments to December 18, 1972 (S.O.F. 126) and, further, there was no evidence that Petitioner had ever known that shipments of extraordinary value were shipped without advance arrangements being made.

There is absolutely no factual basis supporting the trial court's finding that Petitioner specifically waived tariff requirements of advance arrangements regarding shipment under airbill 005-1307-5532.